

EDMUND G. BROWN JR.  
Attorney General of the State of California  
DANE R. GILLETTE  
Chief Assistant Attorney General  
GERALD A. ENGLER  
Senior Assistant Attorney General  
PEGGY S. RUFFRA  
Supervising Deputy Attorney General  
MICHELE J. SWANSON, State Bar No. 191193  
Deputy Attorney General  
455 Golden Gate Avenue, Suite 11000  
San Francisco, CA 94102-7004  
Telephone: (415) 703-5703  
Fax: (415) 703-1234  
Email: Michele.Swanson@doj.ca.gov

Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

**TREMAYNE J. COLLIER,**

Petitioner,

**v.**

**ANTHONY HEDGPETH, Warden,**

Respondent.

C 07-5964 SI (PR)

**ANSWER TO PETITION FOR  
WRIT OF HABEAS CORPUS**

Respondent provides this answer to the order to show cause why the petition for writ of habeas corpus should not be granted:

**I.  
CUSTODY**

Petitioner Tremayne J. Collier is lawfully in the custody of Anthony Hedgpeth, Warden of Kern Valley State Prison, as a result of a judgment of conviction in San Francisco County Superior Court, case number 182125-02. A jury found petitioner guilty of first degree murder and two counts of second degree robbery, with firearm enhancements on all counts. The trial court

1 sentenced petitioner to 13 years plus 51 years to life in state prison.

2 **II.**

3 **GENERAL AND SPECIFIC DENIALS**

4 Respondent denies that the state court rulings were based on an unreasonable  
5 determination of fact or were contrary to or involved an unreasonable application of clearly  
6 established United States Supreme Court precedent. Respondent specifically denies that: (1)  
7 insufficient evidence supports petitioner's convictions and enhancements; (2) the trial court denied  
8 petitioner due process by denying his motion to discharge Juror No. 11; (3) the prosecutor  
9 committed misconduct by questioning a witness about petitioner's pre-trial incarceration, and by  
10 commenting on petitioner's failure to testify during his closing argument; (4) petitioner's sentence  
11 is cruel and unusual; (5) trial counsel was ineffective; (6) appellate counsel was ineffective; (7) the  
12 admission of evidence of a subsequent robbery committed by petitioner violated due process; (8)  
13 the prosecutor's late disclosure of a police report violated petitioner's constitutional rights; (9) the  
14 trial court's denial of petitioner's motion to exclude witness testimony violated due process; (10)  
15 the prosecutor denied petitioner a fair trial by asking a law enforcement witness to comment on the  
16 credibility of a prosecution witness; (11) the trial court's instruction on unjoined perpetrators denied  
17 petitioner due process; and (12) the admission of a photograph of the victim while alive violated due  
18 process.

19 **III.**

20 **PROCEDURAL DEFENSES**

21 Petitioner exhausted his claims in state court. The petition is timely within the meaning  
22 of 28 U.S.C. § 2244.

23 **IV.**

24 **LODGED DOCUMENTS**

25 Respondent has lodged concurrently with this answer the following exhibits: (1) State  
26 Court Clerk's Transcript (9 volumes); (2) State Court Reporter's Transcript (18 volumes, organized  
27 by volume number); (3) State Court Reporter's Transcript (18 volumes, miscellaneous by date); (4)  
28 Opinion of California Court of Appeal; (5) Petition for Review filed in California Supreme Court;

1 (6) Order of California Supreme Court denying review.

2 Dated: June 25, 2008

3 Respectfully submitted,

4 EDMUND G. BROWN JR.  
Attorney General of the State of California

5 DANE R. GILLETTE  
Chief Assistant Attorney General

6 GERALD A. ENGLER  
Senior Assistant Attorney General

7 PEGGY S. RUFFRA  
Supervising Deputy Attorney General

8  
9  
10 /s/ Michele J. Swanson  
MICHELE J. SWANSON  
11 Deputy Attorney General  
Attorneys for Respondent  
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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ANSWER TO  
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**MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF ANSWER TO  
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HABEAS CORPUS**

**STATEMENT OF THE CASE**

In 2004, a jury found petitioner guilty of first degree murder and two counts of second degree robbery, with firearm enhancements on all counts.<sup>1/</sup> 4 CT 961; 5 CT 1070-1074; RT

1. Co-defendant Daniel Mooring was granted a separate trial, and found guilty of robbery special-circumstance first degree murder, two counts of second degree robbery, assault with a deadly weapon, and possession of a firearm by a felon. He was sentenced to life without the possibility of parole on the murder count. Mooring currently has a federal habeas petition pending in this Court. *See Mooring v. Walker*, No. C 07-5013 SI (pr). This Court has designated Mooring's and Collier's federal habeas actions as related cases within the meaning of Civil L.R. 3-12. *See* Mar. 25, 2008 Order.

[7/29/04] 2843-2846.<sup>2/</sup> The trial court sentenced petitioner to 13 years plus 51 years to life in state prison. 5 CT 1223-1224, 1235-1238; RT [12/10/04] 15-21.

In 2006, the California Court of Appeal affirmed the judgment of conviction. Exh. 4. That same year, the California Supreme Court denied a petition for review. Exhs. 5-6.

In 2007, petitioner filed a series of habeas petitions in the state superior court, court of appeal, and supreme court, all of which were denied. *See* Exhs. C-E to the Petition.

Petitioner filed the instant federal habeas petition on November 27, 2007. On February 7, 2008, this Court ordered respondent to show cause why the petition should not be granted.

## STATEMENT OF FACTS

The California Court of Appeal summarized the facts underlying petitioner's crimes as follows:

### I. FACTS AND PROCEDURAL HISTORY

This matter arises from the robbery and assault of Ray LaBonte and the robbery and murder of Shayne Worcester in May 1999, involving Collier, Daniel Mooring, Santese Edwards, and Willie Kennedy.[FN1]

FN1. Our opinion in the matter of *People v. Mooring* (A106400), involving the same incident, was issued on October 3, 2005.

....

....

### A. PROSECUTION EVIDENCE IN THE TRIAL OF COLLIER

#### 1. Robbery of LaBonte

Victim LaBonte left his home in San Francisco around 10:00 p.m. on May 25, 1999, carrying \$8 in cash. As he walked towards Alhambra Street, he saw two black males standing in a doorway. One of them ran behind him. The other approached from the front, raised a weapon, and told him to "get down." LaBonte dropped to his knees. The man in front (purportedly Mooring) aimed a long, black, single-barrel gun at him with two hands and demanded his money and wallet. LaBonte threw the \$8 from his pocket onto

2. "CT" refers to the State Court Clerk's Transcript, which is contained in Exhibits 1A to 1I filed in support of the Answer. "RT" refers to the State Court Reporter's Transcript, which is contained in Exhibits 2A to 2R (volumes 1-18), and Exhibits 3A to 3R (miscellaneous by date), filed in support of the Answer.

1 the ground and said he did not have a wallet. The person behind LaBonte (purportedly  
2 Edwards) checked LaBonte's back pocket for a wallet and hit him in the back of the head.  
3 Mooring then struck LaBonte in his face, probably with the butt of a gun, and LaBonte  
4 lost consciousness.

5 LaBonte recalled that the gunman who approached from the front was about six feet  
6 tall and husky. At Mooring's trial he identified this man as Mooring. The other man was  
7 lankier and about the same height or a little taller, but he did not see his face. Both  
8 assailants had hoods on their heads, wore dark clothing, and were in their mid-20's.

9 Edwards admitted at trial that he and Mooring were the ones who robbed LaBonte.  
10 That evening, Edwards recalled, Collier, Mooring, and Kennedy (also known as "JR") had  
11 picked Edwards up in Collier's Mustang. Edwards was wearing a black nylon pullover  
12 jacket. Kennedy, wearing a black leather jacket, had a .22-caliber rifle in a bag. Collier,  
13 who was driving, wore a black jacket as well.

14 Collier drove them to Market Street, where Kennedy said he saw someone who had  
15 previously robbed him. Kennedy, taking his gun, got out of the car with Collier. Edwards  
16 lost sight of them for a short time, heard a man screaming, and then saw Kennedy and  
17 Collier returning to the car. Kennedy still had the gun.

18 After driving to the Marina District, Edwards spotted a man (LaBonte), walking  
19 alone, whom they could rob. Collier stopped the car, Edwards and Mooring got out, and  
20 Kennedy gave Mooring the .22-caliber rifle. Edwards instructed Collier to meet them at  
21 the same location in about three minutes. Collier drove off with Kennedy.

22 Mooring and Edwards approached LaBonte. Mooring, holding the gun, stood in  
23 front of LaBonte, while Edwards circled behind him. After Edwards went through  
24 LaBonte's pockets and got his money, Mooring hit LaBonte with the gun. LaBonte let out  
25 a gurgling sound and fell to the sidewalk. Mooring and Edwards returned to the drop-off  
26 point, where Collier and Kennedy picked them up. Edwards asked Mooring why he hit  
27 the victim so hard. By the time of trial, Edwards could not recall Mooring's response.

28 Kennedy testified to the same effect. On May 25, he recounted, Collier picked him  
up in Collier's red Mustang. Kennedy, who had his loaded, sawed-off, .22- caliber rifle  
in a gym bag, was wearing a black leather jacket. Collier wore a black coat. They picked  
up Edwards, who was also wearing a black coat. Mooring joined them as well.

At some point, Kennedy and Collier got out of the car and tried to rob a man with  
Kennedy's gun. They then continued on toward the Marina District, discussing "jacking"  
(robbing) someone. When they got to the Marina District, Kennedy saw a man walking  
by himself. Someone in the car said, "let's get out and get him." The car stopped, and  
Edwards and Mooring got out with the sawed-off .22-caliber rifle.

Collier and Kennedy drove around the block and, two or three minutes later, picked  
up Edwards and Mooring, who still had the gun. Kennedy heard Edwards ask Mooring  
why he hit the victim so hard. Without denying that he hit the man, Mooring said that "a  
bullet fell out" of the gun.

San Francisco Police Officer David Garcia testified that he responded to the scene  
of the LaBonte robbery and found blood on the sidewalk and a .22-caliber slug.

Julia Eyerman testified to her observations on the night of May 25 as well. About  
10:00 p.m., she heard loud voices and saw from her window two black men, in dark

1 clothing, getting out of a reddish Mustang or similar vehicle in the middle of the street.  
 2 One of the men was heavier set, and the other was thinner. The car sped off and the men  
 3 walked out of her view. About 20 minutes later, Eyerman heard a commotion and saw  
 4 the two men run from around the corner and get into the Mustang. The car drove off.  
 5 Eyerman later identified photographs of Collier's car as the Mustang she observed that  
 6 night.

## 2. Homicide of Worcester

### a. *Testimony of Worcester's friend, Farley*

7 Christopher Farley and Worcester, who was visiting San Francisco, had dinner with  
 8 a group of friends, went to a bar in the Marina District, and left shortly before midnight  
 9 on May 25, 1999. They walked towards Farley's apartment on Russian Hill. At the corner  
 10 of Hyde and Vallejo Streets, Farley noticed two black men dressed in dark clothing,  
 11 standing against a building as he and Worcester walked by. After Worcester and Farley  
 12 crossed Hyde Street, the men began yelling and running at them. Farley nudged  
 13 Worcester and started to run. When he looked back, Farley saw Worcester face down on  
 14 the ground, with the two assailants standing over him. The men demanded Worcester's  
 15 money or wallet, and Worcester told them it was in his pocket and to take it. At this point  
 16 Farley noticed that the assailants were wearing dark, hooded jackets, but he could not see  
 17 their faces. One or both of the assailants went through Worcester's pockets, and it  
 18 appeared that one of them had Worcester's wallet in his hand. Farley next saw one of the  
 19 assailants raise his arm and lean towards Worcester; then he heard two or three popping  
 20 sounds. The robbers ran off. Farley went to Worcester and saw he was covered in blood.

### b. *Other percipient witness testimony*

21 Christopher Jung lived at the corner of Hyde and Vallejo. Around 12:15 a.m. on  
 22 May 26, 1999, he heard two "bangs" that sounded like gunshots. He looked outside and  
 23 saw a dark-red car with a tan or white convertible top, double-parked on Hyde Street. A  
 24 gangly man over six feet tall with short cropped hair, wearing a black long-sleeved  
 25 sweatshirt and black pants was standing alone in the middle of the street near the back of  
 26 the car. After a minute or two, the man got in the passenger side of the car and the car  
 27 slowly moved away. Jung called 911.

28 Kristen Grant heard loud voices outside her home near the intersection of Vallejo and  
 Hyde Streets around 12:15 a.m. on May 26. One man loudly said, "you better run,  
 motherfucker." She heard people running, and then she heard a man say something to the  
 effect of "give me your wallet," and another man replying something like "okay, whatever  
 you want, fine." Three gunshots rang out in close succession, and more than one person  
 ran away. When she looked out her window 15 or 30 seconds later, she observed a man  
 (Worcester) lying face down on the sidewalk. Another man (apparently Farley) stood  
 over him and was asking for someone to call 911. She did.

### c. *Testimony of accomplice Kennedy*

Kennedy identified Collier and Mooring as the principal perpetrators of the  
 Worcester murder.

According to Kennedy's account, as Collier drove them around San Francisco after  
 the LaBonte robbery, Kennedy, Mooring, Edwards, and Collier discussed robbing  
 somebody else. In particular, Mooring urged them: "let's go riding and see if we can find  
 some more people."



1 Observing two men walking down the street, someone in the car said, "there goes  
2 two guys right there." Collier and Mooring, carrying Kennedy's gun, got out of the car,  
3 and Kennedy and Edwards drove around the block. Kennedy soon heard 2-3 gun shots.  
4 About a minute later, Collier and Mooring, who was still carrying the gun, ran back to the  
5 car and jumped in. The four drove off. Mooring said he did not know why he shot the  
6 victim, while Collier said that he (Collier) had the victim "pinned down." As they left the  
7 scene, Collier threw papers from a wallet out the window.[FN3]

8 FN3. Worcester's driver's license and other items from his wallet were found near the  
9 intersection of Hyde and Lombard streets on the morning of May 26, 1999, and turned in  
10 to the police.

11 The foursome drove to a gas station, where Collier got out and said he was going to  
12 pay for the gas with a credit card. They next dropped off Edwards at his house and drove  
13 to a Denny's restaurant in Emeryville. There, they ate with one of Kennedy's high school  
14 acquaintances (Elena Bishop) and her friends. Collier paid for the food with a credit  
15 card.[FN4] Collier later dropped Kennedy and Mooring off at Kennedy's house. Kennedy  
16 did not know what happened to his gun.

17 FN4. Bishop corroborated Kennedy's account at trial, and specifically identified  
18 Collier, who she told police had been wearing a black leather coat. In addition, there was  
19 evidence that charges were made on Worcester's Visa card at 12:28 a.m. on May 26, 1999,  
20 at a gas station in San Francisco, and at 2:05 a.m. at a Denny's Restaurant in Emeryville.

21 *d. Testimony of accomplice Edwards*

22 Edwards, like Kennedy, testified that Collier and Mooring were the ones who  
23 attacked Worcester and Farley. Edwards explained that, after the LaBonte robbery, they  
24 saw two men walking down the street. Edwards said it was Collier's and Kennedy's turn  
25 to commit a robbery. When Kennedy declined to participate, Collier got out of the car  
26 with Mooring, who had the gun. Edwards and Kennedy stayed in the car.

27 Not long after, Edwards heard two or three fire-cracker sounds. About half a minute  
28 later, Collier and Mooring ran back to the car and got in. Edwards drove off. He asked  
Mooring what he just did, but Mooring did not respond. At trial, Edwards did not recall  
Collier saying anything at the time.[FN5] As they drove from the scene, Kennedy threw  
papers from the wallet out the car window.

FN5. Defense investigator Pamela Olsen testified that she took a statement from  
Edwards in April 2002, during which Edwards told her that Collier said to Mooring, "You  
didn't have to do it."

After stopping for gas, Edwards drove Collier, Mooring, and Kennedy to his house  
and told them to get rid of the gun. Edwards got out of the car, and the other three drove  
away.

*e. Coroner's testimony*

The coroner determined that Worcester died from multiple gunshots wounds. Two  
bullets had entered the back of his head and penetrated his brain; both of these wounds  
were fatal. A third bullet entered his left shoulder. Worcester's wounds were consistent  
with being shot with a Marlin .22-caliber rifle from three to four feet away while lying  
face down on the ground.

1                   3. Police Investigation

2                   San Francisco homicide Inspectors Edward Wynkoop and Curtis Cashen were  
3 assigned to investigate the Worcester case on May 26, 1999. They went to the scene,  
4 interviewed several witnesses, and collected evidence. They also learned that the car  
involved in the shooting matched the description of the car involved in the LaBonte  
robbery that same night, and that .22-caliber bullets were found at both crime scenes.

5                   In early September 1999, Wynkoop received a tip from a California Highway Patrol  
6 officer that a person identified as "Bobbie" had information concerning the involvement  
of "JR," who was later identified as Kennedy. At a meeting at a San Francisco restaurant  
7 on September 8, 1999, "Bobbie" gave Wynkoop a photograph of Mooring and indicated  
that Edwards and Kennedy were also involved, as was a person named "Tremayne," who  
8 was driving a red convertible Mustang. Wynkoop determined from DMV records that  
Tremayne Collier owned a 1991 Ford.

9                   Later in September 1999, Wynkoop met with the victim of an armed robbery at an  
10 ATM in San Rafael in June 1999 (ATM Robbery), about three weeks after the Worcester  
shooting. The victim, Frank Caiazzo, identified Collier as a suspect in the ATM Robbery  
11 by selecting his photograph from a photographic line-up.

12                   On November 22, 1999, police officers executed a search warrant at Collier's home  
in Richmond. In his bedroom officers found a black down jacket. The police crime lab  
13 determined that distinctive gunshot residue particles on both sleeves of the jacket were  
consistent with a man wearing the jacket while standing over a prone victim, next to a  
14 person who shot the victim three times.

15                   Wynkoop spoke with Collier on November 22, 1999, at the Hall of Justice. Their  
conversation was tape-recorded and played for the jury. In the interview, Collier denied  
16 involvement in the Worcester shooting. He claimed that he recognized photographs of  
Kennedy but not Mooring. He identified pictures of his car, but denied he was the person  
17 depicted in photographs taken by the ATM security system at the time of the Caiazzo  
robbery. He told officers, falsely, that he purchased his red Mustang on May 27,  
1999.[FN6] Collier refused to speak to Wynkoop further.

18                   FN6. Rodolfo Gomez, manager of Almaden Auto Sales, testified and produced  
19 documents establishing that he sold a 1991 Ford Mustang to Collier on May 11, 1999.

20                   On that same day, Wynkoop interviewed Mooring, who was in custody. Mooring  
denied involvement. Kennedy refused to speak to Wynkoop and requested a lawyer.  
21 Later that afternoon, Kennedy's attorney faxed the officers a letter asserting Kennedy's  
right to remain silent and his continued assertion of his right to counsel.

22                   On November 24, 1999, however, Cashen was contacted by Sergeant (now  
23 Lieutenant) Michael Ridgway of the Marin County Sheriff's Department. Ridgway  
advised Cashen that he had learned through an informant that Kennedy was interested in  
24 talking about the Worcester incident. Wynkoop and Cashen went to San Rafael and met  
briefly with Ridgway and then with Kennedy. Kennedy provided them details of the  
25 LaBonte robbery and Worcester murder, which the investigators attempted to corroborate.

26                   On December 2, 1999, officers interviewed Kennedy's mother, Renee Williams. She  
told them that "Milo" (Mooring) was at her house the night of the murder and, while they  
27 were watching a TV news report about the killing, she asked Mooring if he was involved.  
Mooring told her that he shot the man.

1 Police confronted Mooring the next day. Mooring explained that he was in the  
2 wrong place at the wrong time and that, if he told them what happened, he would be  
incriminating himself.

3 On December 3, 1999, police interviewed Edwards, who told them he knew nothing  
4 about the incident and that he had either been at work that night or with his girlfriend.  
Officers were unable to confirm his alibis. Three days later, police executed a search  
5 warrant on Edwards' residence. They seized two photographs, one of Edwards with  
Mooring, and one of Edwards with Kennedy. They also seized a black hooded jacket,  
6 which matched the description of the jacket worn by the perpetrators.

7 Officers interviewed Lashonta Bateast, who lived with Mooring's cousin, in May  
2000. Bateast told them that a day or two after the shooting, Mooring was at her house  
8 with another man. Mooring asked Bateast if she had seen the news about a tourist killing.  
He said that he shot the victim because he needed money, and that his accomplice went  
9 through the victim's pockets. The man with Mooring smirked, and she got the impression  
that he was Mooring's accomplice. Bateast identified Edwards as the man with Mooring.

10 Wynkoop had another conversation with Collier on October 18, 2000. A tape of this  
interview was also played for the jury. This time, Collier claimed that on May 25, 1999,  
11 he loaned his Mustang to Kennedy, who was with Mooring and was going to pick up  
Edwards. Collier denied that he went along with them to San Francisco, contending that  
12 he was instead with his girlfriend and met up with Kennedy only later at Denny's.

#### 13 4. Kennedy's and Edwards' Deals with the Prosecution

14 Pursuant to a plea bargain, Kennedy pleaded guilty on April 16, 2001, to a felony  
charge of being an accessory after the fact. He faced a maximum term of three years, but  
15 was given a suspended sentence and placed on three years probation with one day in jail,  
in exchange for giving truthful testimony at the trials of Mooring and Collier. He testified  
16 before a grand jury on April 17, 2001.

17 Later that month, the grand jury indicted Mooring, Collier, and Edwards. Edwards  
was arrested on the indictment in April 2001. After Edwards provided a statement to a  
18 defense investigator, in which he answered questions posed by the prosecutor, he was  
offered a negotiated plea bargain. On June 25, 2002, Edwards pled guilty to felony grand  
19 theft, with the understanding that he would serve no more than four years.

#### 20 5. Evidence of Collier's ATM Robbery

21 Caiazzo testified to being robbed at an ATM around 4:20 a.m. on June 17, 1999  
(approximately three weeks after the Worcester shooting). According to Caiazzo, a man  
22 in a Sausalito bar had introduced him to three men, who said they would give him a ride  
to an ATM so he could withdraw money to purchase drugs from them. He got in their car,  
23 and they proceeded to an ATM. After withdrawing some money, Caiazzo saw one of the  
men--a balding African-American in his early 30's who had been driving the  
24 car--approaching with a short-barrel shotgun.[FN7] The man hit Caiazzo with the butt of  
the gun, Caiazzo fell, and the man put his foot on Caiazzo's back so that his face was on  
25 the ground. Caiazzo gave the man the money, and the robbers drove away.

26 FN7. The officer responding to the ATM Robbery testified that Caiazzo reported it  
was a pump action pellet gun.

27 Although Caiazzo was unable at Collier's trial to identify Collier as the ATM robber,  
28

1 he did identify a photograph of Collier that he had selected from a photographic line-up  
 2 on September 29, 1999 as the one who "looks most like the driver and man with gun."  
 3 In court, he pointed out Collier as a "bigger, older version" of the man in the photograph  
 4 he had selected. Denise LeBard testified that she was present at an "official  
 proceeding"[FN8] on February 23, 2000, at which Collier admitted that he was the man  
 depicted in photographs taken by the ATM security camera on the night of the robbery.  
 He maintained, however, that he was holding an ax handle.

5 FN8. The "official proceeding" referenced in the trial was Collier's parole revocation  
 6 hearing.

7 A retired firearms examiner testified that he had viewed the ATM photographs, and  
 8 the object in the hands of the assailant was consistent with a rifle-type weapon and not  
 inconsistent with a .22 caliber Marlin rifle. [The object was not consistent with an axe  
 handle.]

## 9 B. DEFENSE CASE

10 The defense case attacked the credibility of Edwards and Kennedy. Among other  
 11 things, the defense produced evidence that Kennedy committed a home-invasion robbery  
 in January 2003. In addition, the defense introduced evidence that Edwards was arrested  
 12 in January 2004 for theft of property from a Sears store, and when stopped in May 2004  
 he was found to be in possession of a loaded handgun.

13 The defense also called Lieutenant Ridgway as a witness. Ridgway recounted that  
 14 he was told by an informant, Prudence Wesson, that she had spoken to Kennedy about the  
 shooting and that he had admitted his involvement. Kennedy told Wesson that he never  
 left the car and had nothing to do with the robbery. Ridgway contacted Inspector Cashen,  
 15 who asked Ridgway to try to get a statement from Kennedy. Ridgway called Wesson  
 back and arranged to speak to Kennedy at Wesson's residence.

16 Ridgway surreptitiously recorded his conversation with Kennedy. Kennedy told  
 17 Ridgway that he did not see the actual shooting of Worcester, but observed Collier remove  
 the victim's wallet from his pants, knock the victim to the ground, kick him, and put his  
 18 foot on the victim's throat. Kennedy also told Ridgway that Collier asked Mooring why  
 he shot Worcester, that they used Worcester's credit card at Denny's, and that he threw the  
 19 gun off the Bay Bridge.

20 Ridgway wrote a report on November 26, 1999, about Kennedy's statement. Among  
 21 other things, the report indicated that Kennedy displayed signs of deception when he said  
 that he had thrown the murder weapon off the Bay Bridge.

22 Exh. 4 at 2-12.

## 23 STANDARD OF REVIEW

24 This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996  
 25 (AEDPA), which imposes a "highly deferential" standard for evaluating state court rulings and  
 26 "demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537  
 27 U.S. 19, 24 (2002) (per curiam). Under the AEDPA, the federal court has no authority to grant  
 28

habeas relief unless the state court's ruling was "contrary to, or involved an unreasonable application of," clearly established Supreme Court precedent. 28 U.S.C. § 2254(d)(1). A decision constitutes an unreasonable application of Supreme Court law only if the state court's application of law to the facts is not merely erroneous, but "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). Thus, "[o]nly if the evidence is 'too powerful to conclude anything but' the contrary" should the court grant relief. *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc) (quoting *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005)). The petitioner bears the burden of showing that the state court's decision was unreasonable. *Visciotti*, 537 U.S. at 25.

## ARGUMENT

### I.

#### SUFFICIENT EVIDENCE SUPPORTS PETITIONER'S MURDER AND ROBBERY CONVICTIONS AND GUN ENHANCEMENTS

Petitioner argues that his murder and robbery convictions and gun enhancements violate due process because there is insufficient evidence to support the jury's verdicts. Petition at 6a-6q. Petitioner, however, merely argues his own interpretation of the evidence and the credibility of the witnesses in making his claim. The jury was free to make reasonable inferences from the evidence and weigh the credibility of the witnesses, and the trial record was sufficient to support its verdict in this case.

In deciding a claim of sufficiency of the evidence, the court must determine whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). It is the province of the jury to weigh the evidence and determine the credibility of the witnesses, *id.*, and a defendant's mere disagreement with the jury's view of the evidence is not enough to support a claim of insufficient evidence. Under the AEDPA, the question is whether the state court's application of the *Jackson* standard was objectively unreasonable. *Juan H. v. Allen*, 408 F.3d 1262, 1274-1275 (9th Cir. 2005).

1           The evidence at trial established that petitioner and his friends drove around San Francisco  
2 looking for victims to rob. 2 RT 598, 637; 3 RT 654, 658, 669-670; 4 RT 848-851; 5 RT 951; 6 RT  
3 1209; 9 RT 1539-1546; 11 RT 1724-1725, 1739-1749, 1832-1834; 12 RT 1981, 1998, 2008-2010,  
4 2016. The four young men discussed their plans openly in the car. When they spotted LaBonte  
5 walking alone, petitioner stopped the car and let Mooring and Edwards out so they could rob him.  
6 2 RT 522, 600-603; 3 RT 652, 655, 710; 11 RT 1748-1766, 1785-1794; 12 RT 2016-2017, 2020-  
7 2021; 13 RT 2037-2041, 2051-2054, 2093-2094. Mooring pointed a gun at LaBonte and demanded  
8 his money while Edwards went through his pockets. 2 RT 603-608, 634-635; 11 RT 1765-1772.  
9 Mooring then used his gun to hit LaBonte in the face. In the meantime, petitioner circled around  
10 the block and picked them up when they were done. 2 RT 608-609; 3 RT 657-659, 662; 8 RT 1341,  
11 1404; 9 RT 1561; 11 RT 1768-1773; 13 RT 2041-2042; *but see* 12 RT 1901. When the foursome  
12 later spotted Worcester and Farley walking together, petitioner was the one to get out of the car with  
13 Mooring to rob them. 2 RT 522; 3 RT 710; 11 RT 1785-1794; 13 RT 2051-2054. Petitioner and  
14 Mooring ran after the two men, and petitioner pinned Worcester facedown on the ground. 3 RT 711-  
15 726; 5 RT 927-930. They demanded his money, and, after taking his wallet, Mooring shot him in  
16 the head and back, killing him. Petitioner and Mooring then ran back to the car where their friends  
17 were waiting and drove away. 2 RT 521, 539-540, 564-567, 585; 3 RT 725-738; 4 RT 812, 822-832,  
18 838; 4 RT 864; 5 RT 931-933; 8 RT 1395-1396; 11 RT 1795-1800, 1822; 12 RT 1941; 13 RT 2056-  
19 2059, 2095; 15 RT 2290-2291, 2300, 2309. Petitioner went through Worcester's wallet in the car,  
20 and used one of his credit cards to purchase gas and breakfast for his friends. 3 RT 762-763; 5 RT  
21 915-920, 960-981, 996-1010; 6 RT 1085-1089; 11 RT 1801-1806; 13 RT 2060-2069; 15 RT 2291.  
22 The evidence therefore shows that petitioner was an accomplice to the robbery of LaBonte and a  
23 principal in the robbery-murder of Worcester, both of which involved the use of a gun.

24           Far from demonstrating a lack of evidence supporting his convictions and enhancements,  
25 petitioner merely argues his own view of the evidence. However, the jury was well aware of  
26 petitioner's defense—which consisted of an attack on the credibility of Kennedy and Edwards and  
27 a denial that he knew his friends were planning to rob people—and necessarily rejected such defense  
28



1 in finding him guilty. In sum, because the jury could draw a reasonable inference from the  
 2 prosecution's evidence to support the convictions and enhancements, the state court did not  
 3 unreasonably reject petitioner's insufficient evidence claim.

## 4 5 **II.**

### 6 **THE TRIAL COURT DID NOT DENY PETITIONER DUE PROCESS** 7 **BY DENYING HIS MOTION TO DISCHARGE JUROR NO. 11**

8 Petitioner contends that the trial court denied him the right to a fair trial by denying his  
 9 motion to discharge Juror No. 11 due to her exposure to improper third-party communications.  
 10 Petition at 6r-6u. However, because the alleged third-party misconduct did not result in actual bias,  
 11 petitioner was not prejudiced by the trial court's denial of his motion.

#### 12 **A. Trial Court Proceedings**

13 During trial, Juror No. 11 reported an incident of alleged third-party misconduct to the trial  
 14 court's clerk. 1 RT 487, 491. The trial court excused the other jurors for the day and held an in  
 15 chambers hearing with Juror No. 11, defense counsel, and the prosecutor. 1 RT 487. Juror No. 11  
 16 informed the court of an incident that happened in the hallway of the courthouse as she was walking  
 17 to the jury assembly room for lunch. 1 RT 488. As she passed by two men and a woman, she heard  
 18 the woman say, "'And there's juror number 11, as we speak.'" 1 RT 488-490. She had never seen  
 19 the woman or two men before the encounter in the hallway, nor had she seen them since. 1 RT 490-  
 20 492. Juror No. 11 explained that she thought the incident was something she ought to report. 1 RT  
 21 490-491. When asked how she felt about what she had heard, Juror No. 11 explained that she felt  
 22 "a little threatened" by the comment and the tone of the woman's voice. 1 RT 491.

23 Both sides were given the opportunity to question Juror No. 11. 1 RT 492. When defense  
 24 counsel asked if Juror No. 11 had told the other jurors about the incident, she replied, "No." 1 RT  
 25 492. Defense counsel then asked, "Do you feel now there's any reason why you couldn't be fair to  
 26 both sides?" 1 RT 493. Juror No. 11 indicated that she did not know whether the people in the  
 27 hallway were connected to the defense or the prosecution, or if they were trying to make her  
 28

1 nervous. 1 RT 493. When the trial court asked if she could set the incident aside, she replied, “Oh,  
2 absolutely.” 1 RT 493. When asked if the incident would affect her ability to be fair, she stated,  
3 “No, no, not at all.” 1 RT 493. She stated that she would simply be more cautious, but assured the  
4 court that she would be “all right.” 1 RT 490, 492-494. The court asked her to report back  
5 immediately if she saw the woman or men again. 1 RT 494.

6 The next day, defense counsel moved to discharge Juror No. 11 for cause. 2 RT 502-503.  
7 Defense counsel stated that he was concerned by Juror No. 11's remark that she felt threatened by  
8 the woman's comment in the hallway. 2 RT 503. The prosecution argued that Juror No. 11  
9 appeared to be put at ease by the trial court's inquiry, and that the record did not “reflect any  
10 disqualification or disability to carry out her duties impartially.” 2 RT 504. The trial court denied  
11 the motion, noting that the defense had not made a “sufficient showing of an impairment of [Juror  
12 No. 11's] ability to be fair and impartial here, given what has happened.” 2 RT 504-505. However,  
13 the court stated that it would question Juror No. 11 again later in the week to make sure that there  
14 were no lasting effects from the incident, and noted that the defense could renew its motion at the  
15 time if it had any further concerns. 2 RT 505.

16 At the end of the week, the trial court asked Juror No. 11 if she had any more experiences  
17 with the woman and men that had caused her concern. 4 RT 878. She replied, “Not with regard to  
18 that incident.” 4 RT 878. When the court asked what she meant, she explained that two of the  
19 managers at her work had made inappropriate comments to her about the trial. They had both tried  
20 to get details out of her about the case itself, but she told them she could not discuss it. 4 RT 881-  
21 882. One of them told her to “burn him,” and the other asked her if they should call her “‘Hang  
22 ‘Em High.’” 4 RT 879-880. She said that while she thought that the comments had been made in  
23 jest and not with the intention to pressure her, she did not appreciate them and did not want them  
24 to distract her in her duties as a juror. 4 RT 879-880, 884. She stated, however, that the incidents  
25 would not affect her ability to be fair. 4 RT 884. She indicated that she would talk to them both  
26 about it, and tell them that the comments had to stop. 4 RT 886. The court asked Juror No. 11 to  
27 come in early the following Monday so that they could discuss the matter further. 4 RT 888.



1 Defense counsel did not renew his motion to discharge Juror No. 11.

2 The following Monday, Juror No. 11 told the court that she felt her concerns had been  
3 resolved. 5 RT 905. She related that she had spoken to both managers, and believed that they would  
4 no longer be making any inappropriate comments to her. 5 RT 905-906. She did not feel that her  
5 job was in jeopardy, and felt that she could give her full attention to the trial. 5 RT 906. She had  
6 no concern that the incident would impact her ability to be fair. 5 RT 906. Both parties declined  
7 the court's invitation to question Juror No. 11, 5 RT 906, and defense counsel did not renew his  
8 motion to discharge her.

9 **B. The State Court's Rejection Of Petitioner's Claim Was Not Objectively**  
10 **Unreasonable**

11 In *Remmer v. United States*, 347 U.S. 227 (1954), the Supreme Court addressed the issue  
12 of unauthorized contact with jurors:

13 In a criminal case, any private communication, contact, or tampering,  
14 directly or indirectly, with a juror during a trial about the matter pending before  
15 the jury is, for obvious reasons, deemed presumptively prejudicial, if not made  
16 in pursuance of known rules of the court and the instructions and directions of  
17 the court made during the trial, with full knowledge of the parties. The  
presumption is not conclusive, but the burden rests heavily upon the  
Government to establish, after notice to and hearing of the defendant, that such  
contact with the juror was harmless to the defendant.

18 *Id.* at 229-230. In other words, "due process does not require a new trial every time a juror has been  
19 placed in a potentially compromising situation." *Smith v. Phillips*, 455 U.S. 209, 217 (1982).  
20 Rather, the Supreme Court "has long held that the remedy for allegations of juror partiality is a  
21 hearing in which the defendant has the opportunity to prove actual bias." *Id.* at 215; *see also United*  
22 *States v. Angulo*, 4 F.3d 843, 847 (9th Cir.1993) ("[T]he remedy for allegations of jury bias is a  
23 hearing, in which the trial court determines the circumstances of what transpired, the impact on the  
24 jurors, and whether or not it was prejudicial.")

25 In this case, any claim of prejudice arising from the third-party communications with Juror  
26 No. 11 is rebutted by the record. Here, the trial court explored the alleged misconduct with Juror  
27 No. 11 and its impact on her, and gave counsel the opportunity to question her about the incidents.

1 As for the incident in the hallway of the courthouse, while Juror No. 11 did say she felt threatened  
 2 by the comment and would be more cautious in the future, she also stated that she did not know if  
 3 the people in the hallway were connected to the defense or the prosecution or if they were trying to  
 4 make her nervous. She stated without equivocation that she could still be fair. As for the comments  
 5 made by the managers at work, Juror No. 11 indicated that the problem had been resolved, and that  
 6 it would not affect her ability to be fair or to pay attention to the trial. Defense counsel himself  
 7 appeared satisfied that Juror No. 11's ability to be fair had not been compromised, as he did not  
 8 renew his motion to discharge her after the court conducted its follow-up inquiries with her. The  
 9 trial court's determination that Juror No. 11 was not biased is a factual finding that is presumed  
 10 correct and has not been rebutted by clear and convincing evidence. 28 U.S.C. §2254(e)(1); *Patton*  
 11 *v. Yount*, 467 U.S. 1025, 1038 (1984); *Estrada v. Scribner*, 512 F.3d 1227, 1240 (9th Cir. 2008);  
 12 *Bonin v. Calderon*, 59 F.3d 815, 840-841 (9th Cir. 1995). Given Juror No. 11's forthrightness and  
 13 assurances that the incidents would not affect her ability to be fair, petitioner was not prejudiced by  
 14 the trial court's refusal to discharge her.

15         Petitioner contends that he is entitled to an evidentiary hearing "to determine if Juror 11  
 16 was discharged or not," and cites *Angulo* in support of his contention. Petition at 6t-6u. *Angulo*,  
 17 however, is a federal direct appeal case that established only that an evidentiary hearing is necessary  
 18 to determine if a third-party communication resulted in actual bias, which is what took place in this  
 19 case. We note that the trial court extensively questioned Juror No. 11 about the details of the two  
 20 separate incidents, as well as the effect the two incidents had on her ability to continue to serve as  
 21 a juror. The court also gave both attorneys the option to question Juror No. 11 about the incidents.  
 22 Under these circumstances, petitioner had every opportunity to explore any effect the alleged third-  
 23 party misconduct had on Juror No. 11. In any event, as it is clear from the record that Juror No. 11  
 24 was not discharged, there is no need to conduct an evidentiary hearing on this point. *See* 28 U.S.C.  
 25 § 2254(e)(2) (limiting basis for obtaining federal evidentiary hearing); *see also Tracey v. Palmateer*,  
 26 341 F.3d 1037, 1044 (9th Cir. 2003) (Supreme Court authority does not require evidentiary hearing  
 27 any time juror misconduct comes to light).

1 **III.**

2 **THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING HIS**  
 3 **DIRECT EXAMINATION OF EDWARDS OR DURING HIS CLOSING**  
 4 **ARGUMENT**

5 Petitioner contends that the prosecutor committed misconduct by eliciting testimony from  
 6 Edwards that petitioner was incarcerated before his trial, as well as commenting on petitioner's  
 7 failure to testify during his closing argument. However, as neither of the alleged instances of  
 8 misconduct denied petitioner a fair trial, his claims fail.

9 **A. Trial Court Proceedings**

10 Both the prosecutor and defense counsel questioned Edwards about the time he spent in  
 11 custody before reaching a plea agreement with the prosecution. 11 RT 1818-1829, 1871-1877.  
 12 During the prosecutor's direct examination of Edwards, he questioned him about whether he,  
 13 petitioner, and Mooring had any conversations about the case while they were in custody. 11 RT  
 14 1819-1825. In addition, both the prosecutor and defense counsel questioned Edwards about an  
 15 incriminating letter petitioner wrote and handed to Edwards while they were in adjoining cells. 11  
 16 RT 1826-1829, 1837-1848; 12 RT 1919-1922. Defense counsel did not object to the prosecutor's  
 17 questions referencing petitioner's in-custody status. *See* 11 RT 1818-1829.

18 During his closing argument, the prosecutor pointed out that the prosecution's gunshot  
 19 residue expert was "never challenged," RT [7/27/04] 2740, that there was "no evidence" challenging  
 20 the fact that Kennedy, Edwards, Mooring, and petitioner were friends, RT [7/27/04] 2747, and that  
 21 petitioner himself said in October 2000 that there was "no case against" Kennedy, RT [7/28/04]  
 22 2810-2811.

23 **B. The State Court Did Not Unreasonably Reject Petitioner's Claims Of**  
 24 **Prosecutorial Misconduct**

25 The standard of review for a prosecutorial misconduct claim in the federal habeas context  
 26 is the narrow one of due process and not the broad exercise of supervisory power. *See Darden v.*  
 27 *Wainwright*, 477 U.S. 168, 181 (1986); *Cooper v. McGrath*, 314 F.Supp.2d 967, 992 (N.D. Cal.  
 28 2004). A petitioner's due process rights are not violated unless a prosecutor's comments render a

1 trial fundamentally unfair. *See id.*; *Smith v. Phillips*, 455 U.S. 209, 219 (1982) (“the touchstone of  
2 due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the  
3 culpability of the prosecutor”). The standard is the same for claims of improper questioning of a  
4 witness by the prosecutor. *See Ortiz v. Stewart*, 149 F.3d 923, 934 (9th Cir. 1998). In considering  
5 whether the questioning deprived the petitioner of a fair trial, the witness's testimony should be  
6 viewed as a whole to determine the impact of the alleged improper questioning. *See id.* at 934-935.

7         Here, the prosecutor’s questioning of Edwards did not deny petitioner a fair trial. The jury  
8 was well aware that Edwards was in custody before negotiating his plea bargain, and both the  
9 prosecutor and defense counsel questioned him about his time in jail and its impact on his  
10 motivation to seek a plea agreement. Moreover, the prosecutor introduced a crucial piece of  
11 evidence through Edwards’s testimony—an incriminating letter petitioner handed Edwards while  
12 they were in adjoining cells. It was therefore impossible to avoid mention of petitioner’s pre-trial  
13 incarceration in order to explore this line of questioning. *See United States v. Washington*, 462 F.3d  
14 1124, 1137 (9th Cir. 2006) (finding a state purpose to mention of the defendant’s custodial status).  
15 Such references, however, were minimal, and took up only a small portion of the prosecutor’s entire  
16 direct examination of Edwards. Moreover, defense counsel’s failure to object to such references  
17 suggests that he did not discern any prejudice arising from the prosecutor’s questions. *Id.* Finally,  
18 in light of the damning nature of Edwards’s testimony as a whole, his few references to petitioner’s  
19 in-custody status did not so infect the trial with unfairness as to make the resulting convictions a  
20 denial of due process.<sup>3/</sup>

21         In addition, there is no support for petitioner’s contention that the prosecutor committed  
22 misconduct during his closing argument. Although it is considered misconduct to comment on a  
23 defendant’s failure to testify, *Griffin v. California*, 380 U.S. 609, 615 (1965), that is not what  
24 occurred in this case. Rather, the prosecutor was merely commenting on the lack of evidence  
25

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26         3. Petitioner cites *Duran v. Thurman*, 106 F.3d 407 (9th Cir. 1997), in support of his  
27 argument. However, the opinion is unpublished and may not be cited to this Court pursuant to Ninth  
28 Circuit Rule 36-3(c).

1 challenging the gunshot residue expert's conclusions and the friendship between the four men. *See*  
 2 *United States v. McChristian*, 47 F.3d 1499, 1507 (9th Cir. 1995) (distinguishing between comments  
 3 on the state of the evidence from comments on a defendant's failure to testify); *United States v.*  
 4 *Mayans*, 17 F.3d 1174, 1185-1186 (9th Cir. 1994); *Shumate v. Newland*, 75 F.Supp.2d 1076, 1091  
 5 (N.D. Cal. 1999). Moreover, the prosecutor's reference to a statement petitioner made in October  
 6 2000 was a fair comment on the evidence rather than a comment on petitioner's failure to testify.  
 7 Accordingly, the prosecutor's closing argument did not deny petitioner a fair trial.

#### 8 9 IV.

#### 10 PETITIONER'S SENTENCE IS NOT CRUEL AND UNUSUAL

11 Petitioner contends that his sentence violates the Eighth Amendment's prohibition against  
 12 cruel and unusual punishment. Petition at 6aa-6bb. Petitioner's sentence of 13 years plus 51 years  
 13 to life, however, is not disproportionate to his crimes of murder and robbery.

14 In *Lockyer v. Andrade*, 538 U.S. 63, the Supreme Court held that the only relevant clearly  
 15 established Supreme Court law on the Eighth Amendment is that a "gross disproportionality  
 16 principle is applicable to sentences for terms of years." *Id.* at 72. Legislatures have "broad  
 17 discretion to fashion a sentence that fits within the scope of the proportionality principle." *Id.* at 76.  
 18 While the precise contours of this principle are "unclear," it is applicable "only in the 'exceedingly  
 19 rare' and 'extreme' case." *Id.* at 72-73, quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991)  
 20 (Kennedy, J., concurring). The Supreme Court concluded that the state court's affirmance of the  
 21 petitioner's sentence of 50 years to life, which was based on two current convictions for felony petty  
 22 theft of videotapes with a prior, plus three prior convictions for residential burglary, was not an  
 23 unreasonable application of the gross disproportionality principle. *Andrade*, 538 U.S. at 73-74.

24 Petitioner contends that he was intoxicated and did not know what was going on at the  
 25 time of the robberies and murder in this case. Petition at 6aa. However, the jury necessarily found  
 26 that he possessed the requisite intent to commit his crimes when it found him guilty of murder and  
 27 robbery in this case. Accordingly, his sentence is not disproportionate to his crimes of murder and  
 28

1 robbery. *See Plascencia v. Alameida*, 467 F.3d 1190, 1204 (9th Cir. 2006) (25-years-to-life sentence  
 2 for murder enhanced by consecutive 25-years-to-life sentence for a weapon enhancement not cruel  
 3 and unusual punishment); *Harris v. Wright*, 93 F.3d 581, 583-585 (9th Cir. 1996) (15-year-old  
 4 defendant's sentence of life without the possibility of parole for murder not cruel and unusual  
 5 punishment).

## 6 V.

### 7 TRIAL COUNSEL WAS NOT INEFFECTIVE

8  
 9 Petitioner contends that trial counsel was ineffective for failing to investigate the  
 10 whereabouts of two potential defense witnesses, Leslie Devlin and Tiyon Ford. Petition at 6cc-6ee.  
 11 Petitioner asserts that if Devlin had been located, she would have testified that Kennedy told her that  
 12 he, petitioner, Edwards, and Mooring were all under the influence of drugs at the time of the  
 13 robberies and murder in this case. Petition at 6cc. Petitioner also asserts that Ford would have  
 14 testified that petitioner intervened when Kennedy tried to assault Ford before the robbery of  
 15 LaBonte. Petition at 6dd. Petitioner contends that counsel was also ineffective for failing to call  
 16 an expert to the stand to testify that petitioner would have been unable to form the intent to commit  
 17 his crimes due to his intoxication. Petition at 6ee-6gg. Petitioner contends that the outcome of his  
 18 trial would have been different if each of these witnesses had testified. Petition at 6cc-6gg.

19 In order to prevail on a claim of ineffective assistance of counsel, a defendant must  
 20 establish that: (1) counsel's performance fell below an objective standard of reasonableness; and (2)  
 21 there is a reasonable probability that, but for counsel's errors, he would have received a more  
 22 favorable result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). On federal habeas, a  
 23 petitioner must show that the state court applied *Strickland* to the facts of his case in an objectively  
 24 unreasonable manner. *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (per curiam). "[C]ounsel has a  
 25 duty to make reasonable investigations or to make a reasonable decision that makes particular  
 26 investigations unnecessary." *Strickland*, 466 U.S. at 691.

27 Petitioner has failed to demonstrate that his counsel was ineffective for failing to locate  
 28

1 and call Devlin and Ford as defense witnesses. First, we note that counsel did attempt to locate and  
 2 call both witnesses, but that Devlin left the court's jurisdiction before she could be subpoenaed, and  
 3 that Ford ignored a subpoena to appear in court. *See* CT 828, 1171. Second, in the absence of  
 4 declarations by these witnesses demonstrating what they would have said at trial, petitioner cannot  
 5 meet his burden to affirmatively show prejudice from the failure to call the witnesses. *Allen v.*  
 6 *Woodford*, 395 F.3d 979, 1002 n. 2 (9th Cir. 2005) ("the district court correctly disregarded the  
 7 failure to call [three named witnesses], because Allen failed to make a showing that they would have  
 8 testified if counsel had pursued them as witnesses"); *Dows v. Wood*, 211 F.3d 480, 486 (9th Cir.  
 9 2000) (petitioner presented no evidence that alleged alibi witness "actually exists, other than Dows'  
 10 self-serving affidavit," and could not show that witness would have presented helpful testimony  
 11 because he failed to present affidavit from witness). Counsel's failure to call these individuals did  
 12 not therefore fall below an objective standard of reasonableness.

13 Nor was counsel deficient for failing to call an expert on intoxication. There was no  
 14 substantial evidence in the case that petitioner was intoxicated at the time of the robberies and  
 15 murder. Accordingly, there was no basis for calling such an expert.

16 Finally, petitioner cannot show any prejudice resulting from counsel's performance. Even  
 17 if Devlin had testified in the manner suggested by petitioner, petitioner would not have received a  
 18 more favorable verdict given the overwhelming evidence that he knew exactly what was going on  
 19 around him on the night of the robberies and murder. Further, calling Ford would have only hurt  
 20 petitioner's case, as the encounter further demonstrated petitioner's awareness of, and participation  
 21 in, the criminal activities of his friends on the night in question. Finally, failing to call an expert  
 22 could not have prejudiced petitioner in light of the overwhelming evidence that petitioner was an  
 23 active participant in the crimes. In sum, no ineffective assistance of counsel is shown.

## 24 25 VI.

### 26 APPELLATE COUNSEL WAS NOT INEFFECTIVE

27 Petitioner contends that appellate counsel was ineffective for failing to raise the above five  
 28



Petitioner claims that appellate counsel should have raised additional arguments relating to the sufficiency of the evidence, failure to discharge a juror, prosecutorial misconduct, cruel and unusual punishment, and ineffective assistance of trial counsel. However, as shown above, because each of these claims lack merit, petitioner's claim of ineffectiveness on the part of appellate counsel necessarily fails as well. *See Turner v. Calderon*, 281 F.3d 851, 872 (9th Cir. 2002) (the failure to raise untenable claims on appeal does not constitute ineffectiveness).

**THE ADMISSION OF EVIDENCE OF A SUBSEQUENT ATM ROBBERY COMMITTED BY PETITIONER DID NOT VIOLATE DUE PROCESS**

Collier v. Hedgpeth  
C 07-5964 SI (PR)



inferences to be drawn from such evidence, and that it constituted improper character evidence. Petition at 6ii-6oo. However, because the evidence was probative of petitioner's knowledge and intent, its admission did not violate due process.

#### **A. Trial Court Proceedings**

Before trial, the prosecutor filed a motion in limine seeking to introduce evidence that petitioner committed the ATM robbery three weeks after the robbery and killing of Worcester. 1 CT 199-201; 2 CT 277-278. The court found several similarities between the ATM robbery and Worcester robbery-murder, and ruled that the ATM robbery was admissible to show petitioner's knowledge and intent with regard to the charged crimes. The court also ruled that the evidence was relevant to show petitioner's knowledge of firearms and to refute any claim of mistake, accident, or lack of intent. RT [6/2/04] 126-127, 134.

Right before jurors heard testimony regarding the ATM robbery, the court instructed them that the evidence was being admitted only to show petitioner's intent as to the charged crimes. The court cautioned jurors that they could not use the evidence "to prove that defendant is a person of bad character or that he has a disposition to commit crimes" or "for any other purpose." 9 RT 1458.

Caiazzo testified about the armed robbery at the ATM, and confirmed that he had previously identified petitioner from a photographic lineup as his assailant. 9 RT 1463-1474, 1476-1478. In addition to Caiazzo's testimony, the prosecutor introduced photographs taken by the ATM camera during the robbery, petitioner's admission that one of the photographs was of him and another was of his car, and expert testimony that the object being held by the assailant was consistent with a rifle. 9 RT 1469, 1472-1474, 1476-1478, 1552-1554; 11 RT 1698-1700.

At the close of evidence, the court again instructed the jury that evidence of the ATM robbery could only be used to show that petitioner had the knowledge and intent necessary for the charged crimes and for no other purpose. RT [7/27/04] 2671-2672, 2677; 4 CT 977, 992.

In closing argument, the prosecutor asserted that the jury could use the evidence of the ATM robbery to "answer the question what [petitioner's] knowledge was and what his intent was." The prosecutor then read the trial court's instruction regarding the limited purpose for which the

1 evidence was admitted, and urged the jury to “use that [ATM] robbery three weeks later exactly the  
2 way Her Honor’s law tells you you can.” The prosecutor went on to argue that the “armed robbery  
3 three weeks later tells you that when he’s dropping off Mooring and Edwards in the Marina and they  
4 get LaBonte, that he knows what their purpose is, and he intends for that robbery to go down.” RT  
5 [7/27/04] 2738-2739.

6 Defense counsel argued that the ATM robbery was so different from the charged incident  
7 that it reflected nothing about petitioner’s intent. He also emphasized to jurors the court’s  
8 instruction that they could not use such evidence to infer that petitioner was a bad person. RT  
9 [7/28/04] 2790-2791.

10 In rebuttal, the prosecutor argued that the ATM robbery was “good evidence” that “in all  
11 circumstances, those four men in that little . . . car, they spoke with each other, they know what was  
12 going down, from start to finish . . .” “The man who committed an armed robbery three weeks later  
13 knows that robberies are going down in his presence. The man who committed an armed robbery  
14 three weeks later intends, including all the rest of the evidence, to participate in the armed robberies  
15 that are part of our case.” RT [7/28/04] 2814.

#### 16 **B. California Court Of Appeal Opinion**

17 The California Court of Appeal noted that the “prosecution theory against Collier was that  
18 he was guilty of murder on an aiding and abetting theory,” and that the “prosecution therefore had  
19 to prove that Collier ‘act[ed] with knowledge of the criminal purpose of the perpetrator and with an  
20 intent or purpose either of committing, or of encouraging or facilitating commission of, the  
21 offense.’” Exh. 4 at 15. The appellate court further noted that the defense theory was “that there  
22 was insufficient evidence to prove he aided and abetted because he did not personally participate  
23 in the crimes or even get out of his car, and he did not know that his companions Mooring and  
24 Edwards were committing robberies.” *Id.* at 15. The court concluded that petitioner’s “intent and  
25 knowledge when he drove Mooring and Edwards to the crime scenes and waited for them was  
26 therefore at issue.” *Id.* at 15.

27 The court found that the intent petitioner displayed during the ATM robbery was relevant  
28

1 to his intent during the LaBonte and Worcester incidents. *Id.* at 16. “The point is not that Collier  
 2 was disposed to commit such acts, but that his obvious intent in perpetrating the armed ATM  
 3 Robbery suggests he harbored the same intent in another similar circumstance.” *Id.* at 16. The court  
 4 additionally found sufficient similarities between the ATM robbery and the charged crimes to admit  
 5 the evidence as to petitioner’s intent and knowledge. *Id.* at 16.

6 The court also ruled that the probative value of such evidence was not outweighed by its  
 7 potential prejudicial effect. *Id.* at 17. As the court noted, “the ATM Robbery itself was not more  
 8 egregious or inflammatory than the robbery of LaBonte or the robbery and murder of Worcester.”  
 9 *Id.* at 17. Nor was the ATM robbery the type of incident that would inflame the emotions of the  
 10 jurors, or cause them to be tempted to convict petitioner to ensure his punishment for the uncharged  
 11 offense. *Id.* at 17. The court further noted that the evidence of the ATM robbery was reliable. *Id.*  
 12 at 17.

13 Finally, the court observed that the trial court properly instructed the jury “to use the  
 14 evidence only as it related to [petitioner’s] intent, and not as evidence of bad character or  
 15 predisposition.” *Id.* at 17. The court noted, “We must assume the jury understood and followed the  
 16 court’s instructions.” *Id.* at 17. In addition, the court noted that both the prosecutor and defense  
 17 counsel emphasized the court’s instruction to the jury. *Id.* at 17-18. On this record, the court found  
 18 no abuse of discretion in admitting the evidence. *Id.* at 18.

19 **C. The California Court Of Appeal’s Decision Did Not Constitute An**  
 20 **Unreasonable Application Of Supreme Court Law**

21 The admission of evidence violates due process “[o]nly if there are no permissible  
 22 inferences the jury may draw from the evidence . . . . Even then, the evidence must ‘be of such  
 23 character as necessarily prevents a fair trial.’” *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir.  
 24 1991). In other words, even if evidence is not clearly probative, its admission does not violate due  
 25 process unless the evidence was so prejudicial as to render the trial fundamentally unfair. *Romano*  
 26 *v. Oklahoma*, 512 U.S. 1, 12-13 (1994). The admission of other crime evidence in particular does  
 27 not violate due process when the trial court gives a limiting instruction and retains its discretion to  
 28

1 limit or forbid the admission of particularly prejudicial evidence. *Spencer v. Texas*, 385 U.S. 554,  
2 561 (1967).

3         Petitioner has failed to demonstrate how the admission of the ATM robbery violated his  
4 due process rights. As the California Court of Appeal found, the intent petitioner displayed during  
5 the robbery of Caiazzo "made it more likely that he was harboring a criminal intent to participate  
6 in and facilitate armed robberies when he drove Mooring and Edwards to and from the scene of the  
7 charged crimes." The evidence was therefore probative of a material issue in the case—petitioner's  
8 knowledge and intent in the charged crimes. As the jury could draw a permissible inference from  
9 such evidence, its admission did not violate due process. *Jammal*, 926 F.2d at 920.

10         Additionally, before admitting such evidence, the trial court determined that its probative  
11 value was not outweighed by its potential prejudicial effect. Also, both before the evidence was  
12 admitted and again at the end of trial, the court instructed the jury that it could consider such  
13 evidence only as it related to petitioner's knowledge and intent, and not as evidence of bad character  
14 or predisposition. Given this exercise of discretion and limiting instructions by the trial court, the  
15 admission of evidence of the ATM robbery did not violate due process. *Spencer*, 385 U.S. at 561;  
16 *Williams v. Stewart*, 441 F.3d 1030, 1040 (9th Cir. 2006).

17         Even assuming such evidence was not clearly probative of any issue in the case, it was not  
18 so prejudicial as to deny petitioner a fair trial. As the Court of Appeal found, the evidence of the  
19 ATM robbery was not more egregious or inflammatory than the LaBonte robbery or Worcester  
20 robbery-murder. In addition, because of the ATM photograph of petitioner, the victim's  
21 identification of petitioner from a photographic lineup, and petitioner's admission that he was the  
22 person in the ATM photograph, such evidence had an adequate degree of reliability, and reduced  
23 any danger of the jury convicting petitioner simply to punish him for the ATM robbery. Because  
24 the ATM robbery was not so prejudicial as to render the trial fundamentally unfair, petitioner was  
25 not denied due process. *Romano*, 512 U.S. at 12-13. For these same reasons, the admission of the  
26 ATM robbery did not have a substantial or injurious effect on the verdict. *Fry v. Pliler*, 127 S. Ct.  
27 2321, 2328 (2007).

## VIII.

**THE PROSECUTOR'S LATE DISCLOSURE OF A POLICE REPORT  
DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS**

Petitioner next claims that the prosecutor violated the mandatory disclosure requirements set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to timely provide petitioner with a report written by Lieutenant Ridgway, which summarized his audiotaped interview with Kennedy. Petition at 6pp-6uu. Petitioner further contends that the late disclosure of the report violated his right to the effective representation of counsel, his right to cross-examination, and his right to a fair trial. Petition at 6pp-6uu. However, because defense counsel was able to introduce the report into evidence and question witnesses about it, petitioner was not prejudiced by the prosecution's failure to timely disclose the report.

**A. Trial Court Proceedings**

While testifying at trial on July 1, 2004, San Francisco Inspector Wynkoop testified that on November 22, 1999, Kennedy was taken into custody after the police served a warrant to search his home. 8 RT 1355. Kennedy exercised his right to remain silent. 8 RT 1359-1360. Two days later, Kennedy went into the Marin County Sheriff's office and spoke with Lieutenant Ridgway. 8 RT 1361. Lieutenant Ridgway contacted Inspector Wynkoop and told him that Kennedy had information about the case. 8 RT 1364. Inspectors Wynkoop and Cashen went to Marin. Lieutenant Ridgway gave the detectives a brief summary of Kennedy's account, and then they met with Kennedy. 8 RT 1364, 1367-1368. A videotape of their interview with Kennedy was played for the jury. 8 RT 1371, 1376.

On July 21, 2004, the defense was scheduled to call its last witness, Lieutenant Ridgway, when the trial court excused the jurors for the day. 17 RT 2478. The court explained to the jury that the night before, the prosecutor had given the defense a report written by Lieutenant Ridgway, despite discovery rules requiring that witness statements and reports be turned over 30 days before trial. 17 RT 2478. The court noted that the defense was therefore unable to proceed at that time. 17 RT 2478.

Out of the jury's presence, the trial court held a hearing regarding the late disclosure of

1 the report. Lieutenant Ridgway testified that he had written a supplemental report regarding his  
2 contact with Kennedy and Inspectors Wynkoop and Cashen. 17 RT 2481-2482. On November 29,  
3 1999, he mailed the report and audiotapes of his conversation with Kennedy to Inspectors Wynkoop  
4 and Cashen, and additionally faxed the report to Inspector Cashen. 17 RT 2482-2483. However,  
5 on June 28, 2004, in a conversation between Lieutenant Ridgway and Assistant District Attorney  
6 Harry Dorfman, it became apparent that Dorfman had not seen the report, so Lieutenant Ridgway  
7 faxed it to Dorfman the same day. 17 RT 2484.

8 Inspector Wynkoop testified that he had no recollection of receiving or seeing the  
9 supplemental report before that morning. 17 RT 2491-2492. There was no indication in his  
10 chronological log that he had received the supplemental report. 17 RT 2493-2494. He did receive  
11 a Federal Express delivery of the audiotapes, but there was no mention of the report. 17 RT 2494-  
12 2495. Before he had learned about the report from the prosecutor that morning, he had believed that  
13 everything in his file had been turned over to the defense. 17 RT 2492.

14 Assistant District Attorney Jerry Coleman testified that he handled the case before it was  
15 turned over to Dorfman. He never saw the supplemental report and he never spoke to Lieutenant  
16 Ridgway. 17 RT 2499-2500, 2507.

17 Dorfman testified that he first became aware of the supplemental report during the  
18 conversation with Lieutenant Ridgway on June 28, 2004. 17 RT 2513. On July 20, 2004, he  
19 reviewed it in preparation for Ridgway's testimony. He realized that there was no Bates stamp  
20 number on it, and contacted the defense to see if they had a copy of it. He faxed a copy to defense  
21 counsel later that night after defense counsel indicated he was not familiar with the document. 17  
22 RT 2514.

23 At the end of the hearing, the court recessed for the afternoon so that defense counsel  
24 could have adequate time to prepare for Ridgway's examination the next day. 17 RT 2515-2516.  
25 The next morning, defense counsel moved for dismissal with prejudice. 18 RT 2522-2523.  
26 Although defense counsel acknowledged that the audiotapes and transcripts of Ridgway's interview  
27 with Kennedy were timely produced, he argued that the tapes were difficult to understand, and that  
28

1 the supplemental report allowed him to examine Ridgway “in a way that I never would have been  
2 able to without this report.” 18 RT 2522-2523.

3 While not disputing his obligation to disclose the report to the defense, the prosecutor  
4 asserted that there was “great overlap” between the report and transcripts of the audiotapes, which  
5 had already been timely disclosed to the defense. The prosecutor argued that any delay in providing  
6 the report had not therefore prejudiced the defense, and that dismissal was unwarranted. 18 RT  
7 2526-2528.

8 The trial court denied the motion to dismiss, noting that the prosecutor had produced the  
9 audiotapes of the interview to the defense in a timely fashion. Nonetheless, the court made it clear  
10 that it considered the late disclosure of the report a serious discovery violation. It therefore gave the  
11 defense the option of seeking a continuance and calling additional witnesses. 18 RT 2528-2529.

12 Trial then resumed in the jury’s presence. On direct examination by the defense,  
13 Lieutenant Ridgway testified that he wrote his supplemental report on November 26, 1999, and  
14 made a notation that he faxed it to Inspector Cashen on November 29, 1999. However, he did not  
15 have an independent recollection of having done so. He faxed the report to the prosecutor on June  
16 28, 2004. 18 RT 2554, 2587.

17 After Lieutenant Ridgway’s testimony, defense counsel renewed his motion to dismiss,  
18 which was again denied. Counsel declined the court’s offer of a continuance to recall other  
19 witnesses. 18 RT 2591-2593, 2595.

20 On direct examination by the defense, Inspector Wynkoop testified that he had reviewed  
21 Lieutenant Ridgway’s supplemental report, and agreed that the prosecution had a responsibility to  
22 turn the report over to the defense. He asked Lieutenant Ridgway to send him the audiotapes of his  
23 conversations with Kennedy, and he received those tapes on November 30, 1999. However, he  
24 never received a copy of the report. He acknowledged that the report indicated that Kennedy  
25 contradicted himself, showed signs of deception regarding the weapon, and agreed that those  
26 observations were not contained in the audiotapes. 18 RT 2597-2601.

27 Before deliberations, the trial court instructed the jury pursuant to CALJIC No. 2.28  
28



(Failure To Timely Produce Evidence). After explaining the disclosure requirements under state law, the court told the jury:

In this case, the People concealed and/or failed to timely disclose the Ridg[e]way supplemental report. The Ridg[e]way supplemental report was not disclosed by the People to the defense until July 21st of 2004. Although the People's concealment and/or failure to timely disclose evidence was without lawful justification, the Court has, under the law, permitted the production of this evidence during the trial. The weight and significance of any concealment and/or delayed disclosure are matters for your consideration. However, you should consider whether the concealed and untimely disclosed evidence pertains to a fact of importance, something trivial, or subject matters already established by other credible evidence. Exculpatory evidence is evidence tending to negate the guilt of the accused.

RT [7/27/04] 2676-2677; 4 CT 991.

After the jury found petitioner guilty, he moved for a new trial, arguing that the late disclosure of the Ridgway report deprived him of due process. The motion was denied. RT [11/19/04] 12-48.

#### **B. California Court Of Appeal Opinion**

The California Court of Appeal noted that, "A *delay* in the disclosure of exculpatory evidence warrants reversal only if the delay itself prejudiced the defense. It is the defendant's burden to show that the tardiness of the disclosure was prejudicial, and that a continuance would not have cured the harm." Exh. 4 at 21. To show prejudice, the defendant must show a "reasonable probability" that he "would have obtained a better verdict if the evidence had been disclosed in a timely manner." *Id.* at 22. The court concluded that there was no showing that timely disclosure of the report would have led to a more favorable verdict, or that a continuance would not have cured the harm. *Id.*

The court rejected petitioner's claim that the late disclosure of the report precluded him from effectively cross-examining key prosecution witnesses. *Id.* The court noted that while the defense was unable to use the report in its initial cross-examination of the prosecution witnesses, the defense recalled Inspector Wynkoop and questioned him about the report. *Id.* Moreover, the defense was given the option of requesting a continuance and recalling other prosecution witnesses, but declined both offers. *Id.* The court concluded that petitioner had a "full opportunity to examine



1 witnesses” about the report. *Id.*

2 The court also rejected petitioner’s claim that the delayed disclosure undermined the  
3 preparation and presentation of the defense case, particularly the examination of Ridgway. *Id.* The  
4 court again noted that petitioner was given the option of requesting a continuance, but declined. *Id.*  
5 at 22-23.

6 The court also found that the late disclosure of the report was not prejudicial because the  
7 defense had the audiotapes and transcripts of the interview; the report did not contain any evidence  
8 particularly favorable to petitioner; and the report provided little additional impeachment value. *Id.*  
9 at 23-24.

10 Finally, the court found that the court’s remedial instruction, combined with defense  
11 counsel’s closing argument calling into question the credibility of the prosecution, minimized any  
12 potential prejudice. *Id.* at 24.

13 In sum, the court concluded that “there is no indication that Collier would have obtained  
14 a different outcome if the prosecution had timely provided the Ridgway report to the defense, or that  
15 any harm from the delay could not have been cured by simply accepting the continuance offered by  
16 the trial court.” *Id.* While the court noted that it did not “condone the prosecution’s failure to timely  
17 provide all appropriate discovery to the defense,” it also noted that “it cannot be said that Collier did  
18 not receive a fair trial, or that an earlier introduction of the report would have put the other evidence  
19 in a significantly different light.” *Id.* at 24-25.

20 **C. The California Court Of Appeal Reasonably Concluded That The Late**  
21 **Disclosure Of The Report Did Not Prejudice Petitioner**

22 In *Brady v. Maryland*, 373 U.S. at 87, the United States Supreme Court held “that the  
23 suppression by the prosecution of evidence favorable to an accused . . . violates due process where  
24 the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith  
25 of the prosecution.” “There are three components of a true *Brady* violation: The evidence at issue  
26 must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that  
27 evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice  
28

1 must have ensued.” *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999) (footnote omitted).

2           The prosecutor must disclose “exculpatory and impeachment information no later than the  
3 point at which a reasonable probability will exist that the outcome would have been different if an  
4 earlier disclosure had been made.” *United States v. Copp*, 267 F.3d 132, 143 (2d Cir. 2001); *see*  
5 *also United States v. Agurs*, 427 U.S. 97, 107-108 (1976). Prejudice requires a reasonable  
6 probability, based on all of the evidence, that the defendant would have realized a more favorable  
7 verdict if the evidence had been disclosed in a more timely fashion. *Id.*; *Strickler*, 527 U.S. at 282,  
8 289-290.

9           Here, it is not reasonably probable petitioner would have received a more favorable verdict  
10 had the report been disclosed in a more timely manner. Petitioner contends that he was “unable to  
11 effectively cross-examine key prosecution witnesses” without the report. Petition at 6rr. In  
12 particular, petition claims that he was “unable to explore Wynkoop’s misrepresentation about how  
13 he came into contact with Kennedy initially.” Petition at 6rr-6ss. However, while petitioner did not  
14 have the report of Ridgway’s interview with Kennedy during the prosecution’s case-in-chief, he did  
15 have the actual audiotape and transcript of the interview. *See United States v. Prior*, 546 F.2d 1254,  
16 1259 (5th Cir. 1977) (prosecutor is not required to furnish defendant with information he already  
17 has or could obtain with reasonable diligence). Moreover, after the report was turned over to him,  
18 the trial court gave him the option of recalling the prosecution’s witnesses to cross-examine them  
19 about it. While petitioner recalled Ridgway and Wynkoop and questioned them about the report,  
20 he chose not to recall any other prosecution witnesses. Given that petitioner actually questioned  
21 Ridgway and Wynkoop about the report, and deemed it unnecessary to recall any other prosecution  
22 witnesses on the subject, he cannot now claim he was prejudiced by the late disclosure of the report.  
23 Further, petitioner’s recall of Ridgway and Wynkoop undermines any claim that recalling other  
24 prosecution witnesses would have prejudiced him. *See* Petition at 6tt-6uu.

25           Nor was the “preparation and effective presentation of the defense case . . . impeded” by  
26 late disclosure of the report. Petition at 6ss-6tt. Again, petitioner was in possession of the best  
27 evidence of the interview—the audiotape and transcript—from the outset of trial. Ridgway’s report,  
28

1 which merely summarized the interview, could not have therefore impacted the defense case in any  
 2 significant way. Nor could it have affected the trial court's decision to allow Kennedy's testimony  
 3 at trial. *See* Petition at 6tt. Moreover, once the report was turned over to the defense, the trial court  
 4 gave counsel the option of requesting a continuance and recalling the prosecution witnesses.  
 5 Petitioner, however, declined the offer to continue the trial, and proceeded to question Ridgway and  
 6 Wynkoop about the report. Accordingly, petitioner's claim that he did not have time to prepare for  
 7 his questioning of Ridgway is disingenuous.

8 In sum, the California Court of Appeal reasonably concluded that petitioner suffered no  
 9 prejudice as a result of the prosecutor's failure to timely disclose the report.

## 11 IX.

### 12 THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO 13 EXCLUDE KENNEDY'S TESTIMONY DID NOT VIOLATE DUE 14 PROCESS

15 Petitioner contends that the police used improper promises of leniency to coerce Kennedy  
 16 into making statements which were detrimental to petitioner's penal interests. Petition at 6vv-66aaa.  
 17 He also contends that Kennedy was coerced to testify at trial in conformity with those statements  
 18 pursuant to a plea agreement. Petition at 6vv-6aaa. Petitioner argues that because Kennedy's  
 19 statements and testimony were coerced by the prosecution, the trial court violated his right to a fair  
 20 trial by denying his motion to exclude Kennedy's trial testimony. Petition at 6vv-6aaa. The record,  
 21 however, does not support petitioner's claims of coercion. His due process claim therefore fails.

#### 22 A. Trial Court Proceedings

23 Petitioner filed a pretrial motion to exclude Kennedy from testifying at trial. 3 CT 565-  
 24 572. Petitioner argued that Kennedy's statement to the police was coerced, and that his trial  
 25 testimony would be similarly coerced because his plea agreement effectively required him to testify  
 26 in accordance with the coerced statement. 3 CT 565.

27 The trial court held a hearing on the motion, in which defense counsel questioned  
 28 Inspector Wynkoop about Kennedy's statement to the police. Wynkoop denied that Kennedy was

1 coerced into making his statement. RT [6/1/04] 65-96. At the conclusion of the hearing, the trial  
 2 court denied the motion, observing that the defense could cross-examine Kennedy on these points.  
 3 RT [6/1/04] 95-96.

#### 4 **B. California Court Of Appeal Opinion**

5 The California Court of Appeal rejected petitioner's argument that the police coerced  
 6 Kennedy's statement by promising that if he spoke first, he could exonerate himself. The court  
 7 found that petitioner's argument "distorts the record and is devoid of merit." Exh. 4 at 25.

8 Next, the court found that petitioner had no standing to challenge Kennedy's statement  
 9 to the police. The court noted that to have standing to challenge the voluntariness of a third party's  
 10 statement, a defendant must allege a violation of his own rights. To establish a due process violation  
 11 in this context, a defendant must show not only that the third party's pretrial statement was coerced,  
 12 "but that it affected the reliability of the evidence at trial." The court concluded that petitioner could  
 13 not make such a showing because Kennedy's plea agreement required only that he testified  
 14 truthfully, there was no indication that Kennedy thought he had to testify in conformance with his  
 15 statement, and the record revealed various instances in which Kennedy testified contrary to his  
 16 statement to the police. *Id.* at 25-26.

17 As for the denial of petitioner's motion to exclude Kennedy's testimony, the court found  
 18 that "[t]here was substantial evidence that Kennedy's pretrial statement was not induced by any  
 19 promise from law enforcement." *Id.* at 26. In addition, the court rejected petitioner's argument that  
 20 the plea agreement forced Kennedy to testify in accordance with his statement to the police, noting  
 21 that the agreement called only for Kennedy to testify truthfully. *Id.* at 27. Finally, the court found  
 22 no support for petitioner's argument that an offer of leniency in return for cooperation with the  
 23 police renders a third party statement and trial testimony the product of coercion. *Id.* at 28. The  
 24 court concluded that the trial court did not err in denying petitioner's motion to exclude Kennedy's  
 25 testimony and statement to the police. *Id.* at 29.

#### 26 **C. The California Court Of Appeal's Opinion Was Not Objectively Unreasonable**

27 The United States Supreme Court has held that a defendant does not have standing to  
 28

1 assert a violation of a third party's constitutional rights. *See Rakas v. Illinois*, 439 U.S. 128, 139-140  
2 (1978); *Williams v. Woodford*, 384 F.3d 567, 593 (9th Cir. 2004). Accordingly, the state court's  
3 conclusion that petitioner did not have standing to challenge the voluntariness of Kennedy's  
4 statement to the police was not contrary to clearly established law.

5 As for the admission of Kennedy's testimony at trial, petitioner must show that its  
6 admission rendered the trial so fundamentally unfair as to violate due process. *Williams*, 384 F.3d  
7 at 593. The question is "whether the post-arrest coercion of a government witness so tainted that  
8 witness's trial testimony as to render the testimony's admission a violation of the defendant's right  
9 to due process." *Id.* at 594.

10 First, the state court found no evidence in the record to suggest that Kennedy's statement  
11 to the police was coerced. The court additionally rejected the argument that an offer of leniency in  
12 return for cooperation with the police renders a third party statement the product of coercion. Such  
13 conclusion was not objectively unreasonable. "An interrogating agent's suggestion that a suspect's  
14 cooperation with the government will have a positive effect on the suspect's possible sentence is not  
15 an improper inducement that causes the suspect's later testimony for the government to be  
16 involuntary." *Williams*, 384 F.3d at 594; *Morris v. Woodford*, 273 F.3d 826, 835-836 (9th Cir.  
17 2001).

18 Second, the state court found no evidence that Kennedy was forced to testify in accordance  
19 with his statement to the police. As the court noted, the plea agreement merely required Kennedy  
20 to testify truthfully, not in conformance with his previous statement to the police. Additionally, the  
21 court pointed out that there was no evidence Kennedy thought he had to testify in accordance with  
22 his statement, and in fact, there were several instances in which he testified inconsistently with his  
23 statement to the police. The state court's conclusion was not therefore objectively unreasonable.  
24 *See Williams*, 384 F.3d at 596 (finding no due process violation where the evidence did not suggest  
25 that the witness's testimony was false or that the police instructed him on what to say).

26 Moreover, we note that petitioner had the opportunity to cross-examine Kennedy about  
27 the veracity of his statements. Further, the jury learned that Kennedy received a plea agreement in  
28

exchange for testifying truthfully at trial. The jury was therefore able to assess Kennedy's credibility for itself. *See United States v. Mattison*, 437 F.2d 84, 85 (9th Cir. 1970) (there was no violation of due process when the witness, who was previously illegally interrogated, was subject to cross-examination at trial through which the jury could assess the witness's credibility). Finally, we note that any coercion present at the time Kennedy gave his statement to the police would have dissipated by the time he testified at trial. *See Williams*, 384 F.3d at 595 (coercive atmosphere of interrogation had dissipated with the passage of time). Accordingly, the state court did not unreasonably reject petitioner's due process claim.

## X.

### **THE PROSECUTOR PROPERLY CROSS-EXAMINED SERGEANT RIDGWAY ABOUT KENNEDY'S DEMEANOR AFTER DEFENSE COUNSEL ASKED HIM TO DESCRIBE KENNEDY'S SIGNS OF DECEPTION ON DIRECT EXAMINATION**

Petitioner next contends that Lieutenant Ridgway improperly vouched for Kennedy's truthfulness when being cross-examined by the prosecutor at trial, thus violating his right to a fair trial. Petition at 6bbb-6eee. The trial record, however, shows that Lieutenant Ridgway did not offer any opinion on Kennedy's veracity. In any event, petitioner cannot make out a constitutional claim because he opened the door to such questioning by the prosecutor by asking Lieutenant Ridgway questions about Kennedy's signs of deception during the interview.

#### **A. Trial Court Proceedings**

During direct examination, defense counsel asked Lieutenant Ridgway several questions regarding his statements in the supplemental report that Kennedy showed signs of deception when the lieutenant asked him about the murder weapon. 18 RT 2552-2553. On cross-examination, the prosecutor elicited testimony that Kennedy was very forthcoming and open up until the point Lieutenant Ridgway asked him about the gun. 18 RT 2573-2574. Petitioner moved for a mistrial, arguing that Lieutenant Ridgway had impermissibly vouched for Kennedy's credibility. 18 RT 2575. The trial court denied the motion, finding that defense counsel had opened the door to the

1 prosecutor's inquiry by questioning Lieutenant Ridgway about Kennedy's signs of deception. 18  
2 RT 2581-2582.

3 Before jury deliberations, the trial court instructed the jury in accordance with CALJIC  
4 No. 2.81, which includes the following passage: "Witnesses from law enforcement are not permitted  
5 to express an opinion on either the guilt of the accused or the believability of any witness. You will  
6 disregard any such testimony. The jury is the exclusive judge of the believability and credibility of  
7 the witnesses." RT [7/27/04] 2680-2681; 4 CT 1003.

#### 8 **B. California Court Of Appeal Opinion**

9 The California Court of Appeal noted that it is improper for an officer to testify about a  
10 witness's veracity or lack thereof. Exh. 4 at 31. However, in the matter before it, the court found  
11 that "Ridgway did not draw from the evidence the ultimate inference of truthfulness or deceit; he  
12 testified to Kennedy's demeanor and, at one point, volunteered that he thought Kennedy seemed  
13 "very forthcoming and very open" before Ridgway asked him what happened to the gun." *Id.* The  
14 court further found that "[i]n any event, even if it could be said that [Ridgway] volunteered an  
15 opinion of Kennedy's veracity, defense counsel opened the door to the prosecutor's inquiry." *Id.*  
16 The court noted, "Defense counsel specifically asked Ridgway whether he 'form[ed] any opinions  
17 about whether or not [Kennedy] was *telling the truth*' (italics added) when he said the gun was  
18 thrown off the Bay Bridge, and further inquired about the signs of deception Kennedy displayed."  
19 *Id.* at 31-32. The court observed that the prosecutor merely followed up on those questions during  
20 cross-examination, without any objection from defense counsel. *Id.* at 32. The court concluded that  
21 there was no error because "[w]hen a defendant raises a topic during direct examination, the  
22 opposing party has the right to test that topic during cross-examination." *Id.*

#### 23 **C. The State Court's Determination Was Not Unreasonable**

24 In this case, petitioner must show that the admission of Lieutenant Ridgway's testimony  
25 regarding Kennedy's demeanor during the interview rendered his trial so fundamentally unfair as  
26 to violate due process. *Jammal v. Van de Kamp*, 926 F.2d at 920. Petitioner, however, has failed  
27 to make such a showing in this case.



First, the state court reasonably concluded from the record that Lieutenant Ridgway did not express an opinion about Kennedy's veracity, but merely commented on his demeanor during the interview. Second, even if Lieutenant Ridgway did express such an opinion, the state court reasonably concluded that defense counsel opened the door to such opinion on direct examination by asking Lieutenant Ridgway about Kennedy's signs of deception during the interview. Third, we note that Lieutenant Ridgway's report independently established that Kennedy began to lie only when he was asked about the gun, thus making Lieutenant Ridgway's testimony merely cumulative on this point. Finally, the trial court's instruction to the jury mitigated any possible prejudice arising from Lieutenant Ridgway's testimony. In sum, petitioner cannot show that Lieutenant Ridgway's testimony rendered his trial so fundamentally unfair that it denied him due process. Accordingly, the state court's decision was not contrary to, or an unreasonable application of, clearly established federal law.

## XI.

### THE TRIAL COURT'S INSTRUCTION ON UNJOINED PERPETRATORS DID NOT DENY PETITIONER DUE PROCESS

Petitioner contends that the trial court erred in instructing the jury not to give any consideration as to why other perpetrators of the crime were not on trial. Petition at 6fff-6ggg. Petitioner contends that the court's instruction on unjoined perpetrators conflicted with other instructions and the arguments of defense counsel which told the jury it could disregard Kennedy's and Edward's testimony if it found they were biased because of their plea bargains with the prosecution. Petition at 6fff-6ggg. Petitioner, however, fails to state a federal constitutional claim. In any event, petitioner cannot show any prejudice arising from the court's instruction.

#### A. Trial Court Proceedings

The trial court instructed the jury pursuant to CALJIC No. 2.11.5, regarding unjoined perpetrators of the same crime:

There has been evidence in this case indicating that a person other than the defendant was or may have been involved in the crime for which the defendant is on trial. There may be



1 many reasons why that person is not here on trial. Therefore, do not discuss or give any  
 2 consideration as to why the other person is not being prosecuted in this trial or whether  
 3 he has been or will be prosecuted. Your sole duty is to decide whether the People have  
 4 proved the guilt of the defendant on trial.

5 The defense did not object to the instruction. RT [7/27/04] 2672; 4 CT 980; *see also* 18 RT 2618,  
 6 2629-2630.

#### 7 **B. California Court Of Appeal Opinion**

8 The California Court of Appeal found that giving the instruction under the circumstances  
 9 of this case was error, but that the error was harmless. Exh. 4 at 32. The court noted that other  
 10 instructions given by the trial court adequately informed the jury how to weigh the credibility of  
 11 witnesses. *Id.* at 33. The court further noted that the trial court specifically instructed the jury to  
 12 consider any sentencing benefit received by a witness in evaluating that witness's credibility. *Id.*  
 13 The court concluded as follows:

14 In the matter before us, the trial court's instructions, taken as a whole,  
 15 correctly advised the jury to focus on whether Collier was guilty and to  
 16 consider, among other things, the potential bias of Kennedy and Edwards  
 17 arising from their plea bargains. [T]he jury received the 'full panoply of  
 18 witness credibility and accomplice instructions.' [Citation omitted.] [T]he  
 19 instructions given here as a whole supplied adequate direction concerning the  
 20 process of evaluating the testimony of the witnesses. The jury could not have  
 21 believed it was foreclosed from considering any of the evidence regarding  
 22 Kennedy's and Edward's pretrial statements and plea bargains. Any error in  
 23 giving the instruction was therefore harmless.

24 *Id.* at 33-34.

#### 25 **C. Petitioner Does Not Raise A Federal Constitutional Claim**

26 As in his state court filings, petitioner raises only a state law challenge to the trial court's  
 27 instruction in the instant case. Respondent submits that this claim does not present a cognizable  
 28 federal question, and does not therefore warrant federal habeas relief.

A state prisoner may obtain federal habeas relief only on the ground that he is in custody  
 in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a); *Estelle*  
*v. McGuire*, 502 U.S. 62, 68 (1991); *Engle v. Isaac*, 456 U.S. 107, 119 (1982). Federal habeas  
 review of state court rulings is correspondingly narrow in scope. A federal court has no power to

“reexamine state-court determinations on state-law questions.” *Estelle*, 502 U.S. at 68. Here, petitioner argues only that the challenged instruction was erroneous under the California Supreme Court’s decision in *People v. Cornwell*, 37 Cal. 4th 50 (2005). Petitioner fails to allege that the instruction denied him a federal constitutional right. Further, the California Court of Appeal found only that state law error occurred. *See* Exh. 4 at 32-33 (citing *Cornwell*, 37 Cal.4th at 88, which expressly found that erroneously giving CALJIC No. 2.11.5 did not amount to federal constitutional error). The mere fact that the instruction was incorrect under state law is not a basis for federal habeas relief. *Estelle v. McGuire*, 502 U.S. at 71-72; *Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (per curiam) (erroneous instruction did not violate due process); *see Fetterly v. Paskett*, 15 F.3d 1472, 1479-1480 (9th Cir. 1994) (“the demonstration of an error under state law does not ipso facto equate to the demonstration of a denial of due process under the Constitution”). Accordingly, petitioner’s claim is not cognizable on federal habeas review, and does not warrant federal habeas relief. 28 U.S.C. § 2254(a).

**D. Even If Construed As A Federal Due Process Claim, The California Court Of Appeal’s Opinion Is Not Contrary To Clearly Established Supreme Court Law**

Even if petitioner has adequately pleaded a federal due process challenge to the instruction, his claim lacks merit. An instruction violates due process if there is a “reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.” *Boyde v. California*, 494 U.S. 370, 380 (1990). As the state appellate court found, even if the trial court erred in giving this instruction under state law, the jury was not misled given the instructions as a whole. Here, the jury was specifically instructed regarding witness bias, interest, or other motive. It was also instructed that accomplice testimony should be viewed with distrust, examined with care and caution, and corroborated. In light of the trial court’s instructions read as a whole, there is no reasonable likelihood that the jury understood CALJIC No. 2.11.5 to bar consideration of Kennedy’s and Edwards’s motives for testifying. *See Allen v. Woodford*, 395 F.3d at 996 (given the instructions as a whole, CALJIC No. 2.11.5 did not violate due process). In addition, defense counsel argued that the jury should reject

Kennedy's and Edwards's testimony. RT [7/28/04] 2759-2783. The arguments of counsel may clarify ambiguous instructions. *See McNeil*, 541 U.S. at 438. The state court's decision was not therefore objectively unreasonable. For the same reasons, any constitutional error was harmless. *See Fry v. Pliler*, 127 S.Ct. at 2328.

## XII.

### THE ADMISSION OF A PHOTOGRAPH OF THE VICTIM WHILE ALIVE DID NOT VIOLATE DUE PROCESS

Petitioner next claims the admission of a photograph of murder victim Worcester while alive violated his right to due process and a fair trial. Petition at 6hhh-6kkk. However, because the photograph was probative of Farley's relationship with Worcester as well as his credibility, its admission did not violate due process.

#### A. Trial Court Proceedings

Before trial, the prosecutor moved to admit a color "8 x 10" photograph of Worcester and Farley at Farley's wedding. 2 CT 279. The prosecutor argued that the photograph was probative of Farley's close relationship to Worcester. RT [6/3/04] 191. Defense counsel argued that there was no dispute the two men were friends, and that the photograph would only elicit sympathy from the jury. RT [6/3/04] 192-193. The trial court recalled the photograph from Mooring's trial and confirmed that there were no other people in the picture and, although the two men were in wedding clothes, it was not apparent where they were. RT [6/3/04] 194. The trial court ruled that the prosecutor could introduce the photograph, but not testimony that Worcester served as a best man at Farley's wedding. RT [6/3/04] 202-203.

At the end of the prosecutor's opening statement, he directed the jury's attention to the photograph and said, "In this photograph to your right is Chris Farley, to your left is Shayne Worcester. Now it's a sad photograph. Thank you." 1 RT 429.

At the end of his direct examination of Farley, the prosecutor asked:

Q. Who are the two men in the picture?

A. Shayne and Myself.

1 Q. When was this picture taken?

A. It was taken at my wedding.

2 3 RT 764.

3 **B. California Court Of Appeal Opinion**

4 The Court of Appeal determined that the photograph was relevant to show that Farley and  
5 the victim were close friends, and tended to support the believability of Farley's testimony  
6 concerning the victim. Exh. 4 at 35. The court also found that the probative value of the photograph  
7 was not outweighed by any prejudicial effect. *Id.* Finally, the court found admission of the  
8 photograph "clearly harmless" given that the "photograph was not gruesome or inflammatory and  
9 it was shown to the jury briefly on two occasions at the beginning of the trial." *Id.* at 36.

10 **C. The Court Of Appeal Reasonably Concluded That The Photograph Had  
11 Probative Value And Was Not Prejudicial**

12 As noted above, the admission of evidence violates due process "[o]nly if there are no  
13 permissible inferences the jury may draw from the evidence . . . . Even then, the evidence must 'be  
14 of such character as necessarily prevents a fair trial.'" *Jammal v. Van de Kamp*, 926 F.2d at 920.  
15 Accordingly, even if evidence is not clearly probative, its admission does not violate due process  
16 unless the evidence was so prejudicial as to render the trial fundamentally unfair. *Romano v.*  
17 *Oklahoma*, 512 U.S. at 12-13.

18 The state appellate court reasonably concluded that the photograph of Farley and  
19 Worcester was relevant to show that they were close friends, and tended to bolster Farley's  
20 credibility regarding the victim. Accordingly, because the jury could draw a permissible inference  
21 from the photograph, its admission did not violate due process. *Jammal*, 926 F.2d at 920.

22 However, even if the photograph was not probative, its admission did not prejudice  
23 petitioner. *Romano*, 512 U.S. at 12-13. The photograph itself was not inflammatory, and was only  
24 shown to the jury briefly on two occasions at the beginning of trial. Therefore, the photograph was  
25 not "of such character" as necessarily prevented a fair trial. *Jammal*, 926 F.2d at 920. For these  
26 same reasons, the photograph did not have a substantial or injurious effect on the verdict. *Fry v.*  
27 *Pliler*, 127 S. Ct. at 2328; *Plascencia v. Alameida*, 467 F.3d at 1203 (finding the admission of  
28

1 several premortem photographs of the victim with her children did not have a substantial and  
2 injurious effect on the verdict).

3 **CONCLUSION**

4 Accordingly, respondent respectfully requests that the petition for writ of habeas corpus  
5 be denied.

6 Dated: June 25, 2008

7 Respectfully submitted,

8 EDMUND G. BROWN JR.  
Attorney General of the State of California

9 DANE R. GILLETTE  
Chief Assistant Attorney General

10 GERALD A. ENGLER  
Senior Assistant Attorney General

11 PEGGY S. RUFFRA  
Supervising Deputy Attorney General

12  
13  
14 /s/ Michele J. Swanson  
MICHELE J. SWANSON  
15 Deputy Attorney General  
16 Attorneys for Respondent

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**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: **Collier v. Hedgpeth, Warden**

No.: **C 07-5964 SI (pr)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On June 25, 2008, I served the attached **ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as follows:

Tremayne Collier  
V-60930  
Kern Valley State Prison  
P.O. Box 5102 B3-130  
Delano, CA 93216

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 25, 2008, at San Francisco, California.

\_\_\_\_\_  
D. Desuyo  
Declarant

\_\_\_\_\_  
/s/ D. Desuyo  
Signature